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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

vs.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Texas, Fourteenth District

BRIEF OF AMICI CURIAE CENTER FOR ARIZONA POLICY AND PRO-FAMILY NETWORK IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

1. Whether the evidence presented in this case is sufficient to justify the Court's invalidation of a public policy determination of the Texas Legislature as violative of either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

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Blasband, D., & Peplau, L. A., *Sexual Exclusivity Versus Openness in Gay Male Couples*. 14 Archives of Sexual Behavior 395-412 (1985) 16

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Christy Feig, "Experts Fear HIV Rates Increasing in U.S.," CNN.com, Feb. 12, 2003, available at http://www.cnn.com/2003/HEALTH/conditions/02/12/hiv.rates/index.html (last visited Feb. 13, 2003)..... 9

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Henry J. Kaiser Family Foundation, Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation (2001)..... 25

J. Bailey, *Homosexuality and Mental Illness*, 56 Archives of Gen. Psych. No. 10, p. 183-184..... 24

Jeffrey B. Satinover, *Homosexuality and the Politics of Truth* (1996) 13, 15

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Marcel T. Saghir, M.D. & Eli Robins, M.D., *Male and Female Homosexuality: A Comprehensive Investigation* (1973) 8

Peplau, L. A., & Cochran, S. D., *Value Orientations in the Intimate Relationships of Gay Men*, 6 Journal of Homosexuality 1-9 (1981)..... 16

R.A. Mackey et al., *Psychological Intimacy in the Lasting Relationships of Heterosexual and Same-Gender Couples*, 42 Sex Roles 201 (2000) 17

R.C. Friedman, M.D., *Contemporary Psychoanalysis and Homosexuality*, 98 Experimental and Clinical Endocrinology No. 2 (1991)..... 13

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INTEREST OF AMICI CURIAE

The Center for Arizona Policy is a nonprofit organization working to strengthen policy regarding marriage and the family in the state of Arizona.[1] CAP and its supporters strongly believe children deserve a home with a mother and a father. CAP President Len Munsil drafted Arizona's law banning same sex marriage, and CAP has actively lobbied against extending special workplace job protections based on sexual behavior.

Pro-Family Network (PFN) is a non-profit organization committed to protecting the family and traditional moral values. PFN represents pro-family values in state legislatures, executive agencies, Congress, and before other government bodies and officials, and serves to inform citizens on matters important to the family, morality, and legislation. PFN's founder and director, Greg Quinlan is a registered nurse with professional experience caring for AIDS patients. Mr. Quinlan is also personally interested in this case because he was introduced to sexual activity at the age of 10 by a same-gender neighbor and struggled with same-se x attraction until his late 20s. During that time, Mr. Quinlan was also involved in the homosexual lifestyle and gay activism. Concurrent with an introduction to religious faith, Mr. Quinlan left the homosexual lifestyle and gay activism.

Amici are concerned that this Court not rely on incomplete information provided by Amici American

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[1] No counsel for a party authored any part of this brief. No person or entity other than *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

Psychological Association et al. in determining this important matter of law regarding sexual conduct.

SUMMARY OF ARGUMENT

Petitioners' challenge to Texas Penal Code § 21.06, a law prohibiting "deviate sexual conduct" between persons of the same sex, raises numerous issues of social, moral, legal and scientific importance. Petitioners and their Amici seek this Court's intervention in the midst of a longstanding and contentious public debate over societal and sexual mores and the proper role of government. Before inserting itself into this controversy, however, the Court should be fully aware that it is also inserting itself into the midst of a developing field of scientific research, and should exercise great caution to avoid any decision which may ultimately prove to be on the wrong side of science.

In its amici curiae brief to this Court, the American Psychological Association, et al. (hereinafter, "APA Amici"), argued, *inter alia*, that homosexuality is a "normal form of human sexuality," that homosexuality has no inherent association with psychopathological conditions, and that same-sex unions are largely similar to heterosexual marriages. At best, these claims are controversial, and in some cases the APA Amici's arguments are misleading or simply false.

This brief will bring to the Court's attention data which clarifies or contradicts a number of assertions presented in the APA Amici brief. The APA Amici's own experts elsewhere contradict the APA's assertions that homosexuality bears no connection to psychopathological condition, and undermine the confidence with which the APA Amici assert that any such correlation is simply the result of societal prejudice. In addition, several key studies

relied upon by the APA Amici are either methodologically flawed or have been contradicted by more recent research. To the extent that such data is relevant to the Courts' consideration of this case, it is important that the Court be presented with an accurate and comprehensive look at the available scientific research.

ARGUMENT

I. THIS COURT SHOULD DEFER TO THE WISDOM OF THE TEXAS LEGISLATURE RATHER THAN INSERT ITSELF INTO AN ONGOING SCIENTIFIC DEBATE.

No decision of this Court may legitimately be based on the research presented by the APA Amici in their brief.[2] While purportedly based on psychological and psychiatric research, the APA Amici's brief misconstrues and selectively applies several important studies. In addition, authors of the APA brief have overlooked more recent studies which contradict some of the earlier conclusions cited in the brief. While contributions from the psychological research community are valuable to this Court's understanding of the nature of homosexuality and same-sex sexual activity, such data must be presented in a neutral and comprehensive manner. Unfortunately, the APA Amici fail to do so.

Nonetheless, the issues raised by APA Amici are important questions to be brought to the attention of this

[2] Amici APA bring a large body of scientific evidence to the Court's attention for the first time on appeal. As will be discussed below, much of this data is controversial and not appropriate for the judicial notice of the Court. To the extent that Amici APA have introduced new evidence on appeal, such research is not properly before the Court. Once the new evidence is stripped away, the APA's brief contains little information of value to the Court and should be disqualified under Supreme Court Rule 37.1.

Court, highlighting the manner in which scientific research intersects with public policy. This Court appropriately exercises great caution when asked to take sides in an ongoing public policy debate. *Schall v. Martin*, 467 U.S. 253, 281 (1984) ("[I]t is worth recalling that we are neither a legislature charged with formulating public policy nor the American Bar Association committee charged with drafting a model statute."); *Reno v. Flores*, 507 U.S. 292, 315 (1993).

Much of the research relied upon by Amici APA is methodologically flawed, inconclusive, or conflicts with subsequent research in the area of homosexuality. Until the research surrounding homosexuality is developed to the point where it produces reliable and consistent outcomes, this Court cannot rely on it as a sufficient basis to warrant intervention in the public policy decisions of the Texas Legislature. Rather, this Court should defer to the legislative wisdom of Texas elected officials, leaving questions of public policy in the legislative arena where policy can be easily amended in response to additional research.

II. PETITIONER'S AMICI AMERICAN PSYCHOLOGICAL ASSOCIATION, ET AL., RELY ON RESEARCH WHICH IS SELECTIVELY CITED, CONTROVERTED BY THEIR OWN EXPERTS' RESEARCH, INCONCLUSIVE OR FLATLY IN ERROR

In its amici curiae brief to this Court, the American Psychological Association, et al., argued, *inter alia*, that homosexuality is a "normal form of human sexuality," that homosexuality has no inherent association with psychopathological conditions, and that same-sex unions are largely similar to heterosexual marriages. At best, these claims are controversial, and in some cases Amici APA's arguments are misleading or simply false.

An objective review of the APA brief suggests that it is driven more by political motivation than by scientific data. In their brief, Amici APA repeatedly rely on studies which have been subsequently refuted or questioned, and ignore studies which do not support their desired outcome in this case. Notable among these are studies of homosexuality as it relates to psychopathology, and even the works of some contributing to the APA's brief.

Perhaps most remarkable among the studies relied upon by the Amici APA is the work of Charlotte Patterson, who is acknowledged as a contributor to the APA brief and who also wrote several of the studies relied on by the Amici APA. APA Br. at 1, n.2, and 20. In 1997, a Florida Court was forced to exclude her studies from evidence in the case, concerned about her impartiality as a researcher. In that case, Patterson was sanctioned by the court for refusing to turn over any data supporting her gay parenting studies, even to the attorneys who hired her as an expert witness. *Amer v. Johnson*, 4 Fla.L.Wkly.Supp. 854b (Fla. 17th Cir. 1997).

Peer reviews of Dr. Patterson's studies have revealed fundamental flaws, including the presentation of small, self-selected samples as quantitative research. According to Robert Lerner, Ph.D. and Althea Nagai, Ph.D., these studies are "deeply flawed," primarily because of the fact that "when either or both the study and comparison groups know the purpose of the study and have a large stake in the substantive outcome, one almost inevitably introduces very serious sample selection biases into a study. The participants have every incentive to paint themselves in the best possible

light." [3] In addition, Dr. Patterson's studies have relied on small samples groups, in one case as few as 35 participants.[4]

Evelyn Hooker's study, *The Adjustment of the Overt Male Homosexual*, upon which Amici APA heavily rely to assert that homosexuality is not a psychopathology also contains serious and numerous methodological defects, both in motivation for the study by Hooker and the study participants and in mathematical miscalculations.

Hooker's study group was not random, but made up of volunteers from the gay rights group Mattachine Society which her report notes "has as its stated purpose the development of a homosexual ethic."[5] This alone is sufficient to deprive the study of any statistical validity. In addition, individuals who proved unstable were later deleted from the final sample.[6]

In addition, Hooker's research required administration of the Rorschach test (a complicated test with which she had no prior administration experience), the Thematic Apperception Test (TAT) in which the subjects make up stories about pictures of people in various settings, and the Make-A-Picture-Story (MAPS) Test in which subjects arrange cut-out pictures and then make up a story about their arrangement.

The homosexual subjects engaged in (homo)sexual fantasies during the TAT and MAPS tests, thereby exhibiting a highly significant statistical association between

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[3] Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* at 69, 74 (2001). *See also* Judith Stacey and Timothy Biblarz, *(How) Does The Sexual Orientation of Parents Matter?*, 66 Am. Sociological Rev. 159 (2001).

[4] Lerner, *id.*, at 103.

[5] E. Hooker, *The Adjustment of the Male Overt Homosexual*, 21 Journal of Projective Techniques 17, 19 (1957).

[6] Thomas Landess, *The Evelyn Hooker Study and the Normalization of Homosexuality*, 5 NARTH Bulletin 8 (Dec. 1997)(emphasis added).

homosexuality and obsessive sexual fantasy (a standard category for diagnosing psychopathology using Rohrshach and similar "projective tests." The heterosexual subjects showed no such disproportionate evidence. Because the identity of the homosexual subjects was so obvious from these tests, Hooker changed her study midstream and removed from TAT and MAPS tests from the judges' review. This alteration of her study alone is sufficient to automatically invalidate its results; unaltered, the study confirms precisely the opposite of what she claims. Note that from a point of view that is agnostic with respect to the "normalcy" of homosexuality per se, the critical finding excluded by Hooker is the qualitative *form* of the fantasy life exhibited by the homosexual subjects (i.e., obsessive), not the homosexual *content.* E. Hooker, *The Adjustment of the Male Overt Homosexual*, 21 Journal of Projective Techniques 17, 19 (1957).

Finally, Hooker concluded her report with a "*highly selective summary* of comments by judges, all of which support her thesis that the two groups are, in effect, indistinguishable in terms of 'overall adjustment.'"[7]

Even having chosen to use Hooker's research, the Amici APA do so selectively, ignoring the fact that Hooker finds data to suggest that homosexuality is a pathology, even if limited to the realm of sexuality.[8] Such could be the case, but for the fact that the homosexuals studied were unable to control their homosexual fantasies even in "non-erotic situations" as the MAPS and TAT tests.

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[7] *Id.*

[8] Hooker, *supra.*, at 30 (noting that the pathology of homosexual may only occur "in an erotic situation, and that the homosexual can function well in non-erotic situations such as the Rorschach, TAT, and MAPS. Thus, one could defend the hypothesis that homosexuality is symptomatic of pathology, but that the pathology is confined to one sector of behavior, namely, the sexual."

Hooker also notes in her study that "the life history data from the two groups will differ: namely, in the love relationships. Comparisons between the number and duration of love relationships, cruising patterns, and degree of satisfaction with sexual pattern and the love partner will certainly show clear-cut differences."[9] While Hooker has never published these life histories recorded at the time of the study, they likely comport with subsequent data from other researchers revealing a greater number of sexual partners among homosexuals than heterosexuals,[10] and a significantly shorter duration in relationships.[11]

III. AMICI APA FAIL TO ACKNOWLEDGE, YET OWN EXPERTS CONFIRM, THAT THERE IS GREAT VARIABILITY IN HOMOSEXUALITY OVER THE LIFESPAN OF AN INDIVIDUAL, MORE FREQUENTLY DISAPPEARS SPONTANEOUSLY THAN NOT, AND IS SIGNIFICANTLY CHANGEABLE OTHERWISE

The Amici APA brief states that homosexual orientation is "highly resistant to change" (APA Br. at 4), but fails to

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[9] *Id.*

[10] See, e.g., Laumann et al., *The Social Organization of Sexuality* 315 (1994). (Relied upon for other purposes in the APA brief, this source shows that the mean lifetime (after age 18) number of sexual partners for male homosexuals/bisexuals was 35.9, compared to 16.6 partners of heterosexual males, and 19.8 for homosexual/bisexual females, compared to 5.1 for heterosexual females.).

[11] L.A. Peplau & Susan D. Cochran, *A Relationship Perspective on Homosexuality* 321, 335 *in Homosexuality/Heterosexuality: Concepts of Sexual Orientation* (1990) (only study cited for "the longevity of relationships" covered a total period of 18 months); Marcel T. Saghir, M.D. & Eli Robins, M.D., *Male and Female Homosexuality: A Comprehensive Investigation* 57, Table 4.13; 225, Table 12.10 (1973) (15% of homosexual men and 17.3% of homosexual women surveyed had relationships lasting more than 3 years; only 4 out of 252 men and 1 out of 138 women stayed together more than 10 years).

acknowledge that many have successfully changed from a homosexual to heterosexual orientation, or that thi. has increased their levels of happiness[12] and removed them from a high medical risk behavior group.[13]

Amici APA define "homosexual orientation" as "enduring, and then state that homosexual orientation is "highly resistant to change." While as a tautology this can only be true, they fail to report that many individuals—indeed, if their own cited expert is to be credited, nearly half (at a minimum)—of those who (once) belonged to the "group" amici purport to represent spontaneously changed from a homosexual to heterosexual "orientation,"; that many studies show a significant rate of psychotherapeutic exit from homosexuality and that this change, whether spontaneous or deliberate, is associated with significantly higher levels of happiness, lower levels of sexual dysfunction, lower levels of psychopathology and removed them from behavior group at extremely elevated risk for

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[12] Laumann et al. at 362 ("[H]omosexual men and women report themselves to be unhappy . . . ."). Laumann's "Levels of Happiness, by Sexual Behaviors" data, Table 10.4 reveals those reporting male and female homosexuality, as well as participation in oral or anal sex in the last sexual event showed statistically lower levels of happiness, whereas individuals who had one sexual partner in the last year, were male or female heterosexuals, and had not engaged in oral or anal sex in their last sexual event scored statistically higher levels of happiness. *Id.*

[13] *See, e.g.*, Laumann at 396 ("[A]nal intercourse is known to have a higher rate of infectivity of HIV than oral or vaginal intercourse."); Christy Feig, "Experts Fear HIV Rates Increasing in U.S.," CNN.com, Feb. 12, 2003, available at http://www.cnn.com/2003/HEALTH/conditions/02/12/hiv.rates/index.html (last visited Feb. 13, 2003) ("Sabina Hirshfield, director of the Medical and Health Research Association of New York City, said another factor [in the 2001 14% rise in HIV diagnosis among men who have sex with men] might be tied to the use of the Internet to meet potential sex partners. Her clinic's survey of almost 3,000 gay men who said they frequent chat rooms found that 84 percent claimed they meet sex partners online and almost two-thirds admitted to unprotected sex.").

numerous severe and often life-threatening medical conditions in addition to that posed by HIV/AIDS: again, as repeatedly documented in studies conducted by amici's own contributors and experts as well as innumerable others. *See generally,* Laumann et al., *The Social Organization of Sexuality* and R. T. Michael et al. *Sex in America: A Definitive Survey* (1994).

E.O. Laumann's data, compiled in *The Social Organization of Sexuality*, and cited to by the APA "represent[s] the most varied and comprehensive measures of different aspects of homosexuality to be collected on a representative sample of U.S. adults."[14] Chapter 8 of Laumann et al. provides their extensive data and detailed analyses of homosexuality, homosexual behaviors and both prior and later psychological states associated with both. The Amici APA brief claims, "The exact proportion of heterosexuals, homosexuals and bisexuals in the United States are not known." APA Br. at 5. And claim that "different surveys have reached different estimates." They approvingly reference the research of Laumann et al. as "representative," offer a single statistic from within the data in Laumann pages 294-297, and otherwise avoid presenting the essence of his findings. In this section, Laumann et al present their data on the prevalence of homosexuality and the *congruence of theirs and all other validated such studies*. They discuss at length the fact *that the prevalence of men who have sex with men is not enduring but declines drastically with maturity*. In considering amici's argument as to the persistence of the trait that characterizes their claimed constituency, and the centrality of suspect class status to the legal debates surrounding homosexuality, it would be well worth the Court's time to read this material and come to their own conclusions as to what it demonstrates. Laumann's own explanation of why "The exact proportion of heterosexuals,

[14] Laumann et al., at 320.

homosexuals and bisexuals in the United States are not known" differs strikingly from the APA's: "...[E]stimating a *single* number for the prevalence of homosexuality is a futile exercise because it presupposes assumptions that are patently false: that homosexuality is a uniforn attribute across individuals, that it is stable over time, and that it can be easily measured."[15]

Not only have homosexuals been shown to spontaneously transfer out of a homosexual orientation, individuals have also changed their sexual orientation from homosexual to heterosexual. In his 2001 study, Dr. Robert Spitzer[16] revealed that 60-64% of study subjects experienced "good heterosexual functioning," even among those who were exclusively homosexual.[17]

Another important benefit reaped from this change effort is that study participants experienced a significantly marked decrease in depression between the time they were predominantly homosexual and the time they were experiencing good heterosexual functioning. In the year prior to their sexual orientation change effort, 43% of men and 47% of women experienced depression. After having

[15] Laumann et al., p 283

[16] Chair of the APA's Committee on Nomenclature in 1973 who spearheaded removal of homosexuality from DSM classification. With assistance from Dr. Richard C. Friedman, Dr. Spitzer later challenged his own views with a study of 204 subjects who had achieved "a change from homosexual to heterosexual attraction that has lasted at least five years." Dr. Robert L. Spitzer, *200 Subjects Who Claim to Have Changed Their Sexual Orientation From Homosexual to Heterosexual*, Presentation to Annual Meeting of the American Psychiatric Association, May 9, 2001.

[17] "Good heterosexual functioning" meant subjects were in a loving heterosexual relationship through the year prior to interview with emotional satisfaction of 7 on 1-10 scale, have heterosexual sex at least once a month, physical satisfaction from partner at 7 on 1-10 scale, and never or rarely have same-sex thoughts while having sex with the heterosexual partner. Spitzer, *id.*

changed their sexual orientation, only 1% of men and 4% of women were experiencing depression.[18]

The Amici APA brief criticizes studies showing individuals' successful sexual orientation change from homosexual to heterosexual for being based on self-reports of study participants. However, the APA's own cited resources rely heavily on self-reports for their findings. APA Br. at 23 (self-reports of homosexuals experiencing verbal harassment and violence because of sexual orientation.) If, as noted by the Amici APA, anti-gay harassment and violence are underreported by homosexuals, it is just as likely that changes in sexual orientation are undereported because of the American Psychiatric Association's unwillingness to validate their experiences.

In his presentation at an American Psychological Association symposium on August 7, 2000, Amici's own expert, Douglas C. Haldeman, Ph.D., stated:

"There appear to be many dissatisfied homosexually-oriented individuals who seek...change...particularly those who have have experienced less invasive styles of of conversion therapy seem not to have been affected adversely...do we have the right to deny such an individual treatment that may help him adapt in the way he has decided is right for him? I would say not."[19]

The success of this change effort, and its benefit to those who have and are seeking to change their sexual orientation, should not be ignored by the APA or by this Court.

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[18] *Id.*

[19] "APA Symposium Seeks Common Ground," report by Martin B. Koretzky, Ph.D., accessible at http://www.narth.docs/commonground.html (hard copy provided upon request).

IV. THE APA'S DECISION TO DECLASSIFY HOMOSEXUALITY AS A DISORDER WAS NOT BASED UPON SCIENTIFIC RESEARCH

The Amici APA brief implies that the decision to remove homosexuality from the Diagnostic and Statistical Manual ("DSM") was based on scientific research. However, it has been well documented that the decision was largely, if not primarily, a political decision as a result of pressure from homosexual activists. Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* 189 (1987) ("That the American Psychiatric Association responded to the concerted pressure of an angry, militant movement that had made full use of coercive and intimidating tactics is undeniable"); Jeffrey B. Satinover, *Homosexuality and the Politics of Truth* 31-35 (1996); Charles W. Socarides, M.D., *Homosexuality: A Freedom too Far* 157-82 (1995). Even writers sympathetic to the homosexual movement have acknowledged the influence of activists on the decision. *See* R.C. Friedman, M.D., *Contemporary Psychoanalysis and Homosexuality*, 98 Experimental and Clinical Endocrinology No. 2, 155-60 (1991) ("The decision by the American Psychiatric Association to drop homosexuality as a diagnostic category from the DSM occurred in a context in which Gay Activism made its influence felt"). In fact, the Amici APA cite only one pre-1973 study that supposedly provided a scientific basis for declassifying homosexuality as a disorder. E. Hooker, *The Adjustment of the Male Overt Homosexual*, 21 Journal of Projective Techniques 17, 19 (1957). Even in citing the Evelyn Hooker study, the Amici APA ignore the fact that the study was not scientific, and yet still found evidence suggesting that homosexuality is a pathology, at least in the limited arena of human sexuality. *See* Thomas Landess, *supra*. Hooker, *supra.*, at 30.

Although the initial recommendation to remove homosexuality from the DSM purportedly came from the

Nomenclature Committee, it was never approved by that committee, but was only the recommendation of one member, Dr. Robert Spitzer. Bayer, *id.*, at 131. Indeed, the Nomenclature Committee, which had no experts on homosexuality among its members, was heavily divided because it felt that the change would be *good socially*, but that it was *not supported scientifically*. *Id.* at 129-30. Nevertheless, Spitzer's recommendation was submitted to the APA Council on Research and Development, which approved it despite knowing that the Nomenclature Committee had not done so. *Id.* at 133. The APA board of trustees' approval of removing homosexuality from the DSM resulted in an outcry from members who felt that the decision was not based on science. *Id.* at 139-42. As a result of the opposition, the APA leadership agreed to have a referendum on the decision. *Id.* at 143. In response, the National Gay Task Force ("NGTF") orchestrated the writing and signing of a letter from the APA leadership in support of the decision to every member. The NGTF also "purchased the necessary address labels from the [APA], and underwrote the full cost of the mailing." *Id.* at 145.

> Though the NGTF played a central role in this effort, a decision was made not to indicate on the letter that it was written, at least in part, by the Gay Task Force, nor to reveal that its distribution was funded by contributions the Task Force had raised. Indeed, the letter gave every indication of having been conceived and mailed by those who signed it. . . . Though each publicly denied any role in the dissimulation, at least one signer had warned privately that to acknowledge the organizational role of the gay community would have been the "kiss of death."

Id. at 146 (citation omitted).

With only a little over 10,000 members responding to the referendum, 37 percent opposed the change. *Id.* at 148. "The result was not a conclusion based on an approximation of the scientific truth as dictated by reason, but was instead an action demanded by the ideological temper of the times." *Id.* at 3-4. Despite the APA decision, a survey four years later found that 69 percent of psychiatrists still believed that "homosexuality is usually a pathological adaptation, as opposed to a normal variation." Socarides, *supra*, at 179; *see also* Satinover, *Homosexuality and the Politics of Truth* 35 (1996).

V. LESBIANS AND GAY MEN DO NOT FORM FAMILY UNITS SIMILAR TO HETEROSEXUALS

The APA Amici portray homosexual couples as in no essential way different from heterosexual couples in the types of relationships they form, the level of "commitment" they have, the character of emotional intimacy between them, and in their parenting outcomes. It should be noted by this Court that research from the APA's own experts, inter alia, reveals that lesbians and gay men do not characteristically form social units comparable to the family and sexual relationships of heterosexuals.

A. Partner Commitment Levels and Behavior

APA Amici refer to "committed relationships" based on same-sex sexual activity, but nowhere discuss or report on whether such relationships are monogamous, nor do they relate how long these relationships last. APA Br. at 18.

The most common same-sex relationship configuration, particularly those of gay men, is that of an "open relationship." F.C. Hickson, et al., *Maintenance of Open Gay Relationships: Some Strategies for Protection Against HIV*, 4

AIDS Care 409 (1992).[20] In fact, the longer a couple is together, *i.e.*, "committed," the more non-exclusive their relationship usually is. *Id.* "The higher mean numbers of partners for respondents reporting same-gender sex corresponds to a stereotype of male homosexuals that is widespread in our society." Laumann et al., *supra* at 316.[21]

As compared to heterosexuals, "[t]he expectation for outside sexual activity was the rule for male couples and the exception for heterosexuals." D. McWhirter and A. Mattison, *The Male Couple: How Relationships Develop* (Englewood Cliffs, N.J.: Prentice-Hall, 1984), p. 3.[22]

One survey of homosexual men in relationships reported that 65 percent had sex outside the relationship within the first year, with approximately 90 percent of the men in relationships lasting over five years being "nonexclusive." Joseph Harry, *Gay Couples* 115 & Table 6.1 (1984). A study of married heterosexual couples, however, revealed that 94%

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[20] Of 387 men interviewed, 65.1% had one or more regular sexual partner, 43.7% of those in relationships were deemed monogamous relationships, but 56.3% were deemed open relationships. Hickson, et al., *id.* APA's own sources and authors have conducted research consistent with the finding that the most common relationship configuration for homosexual men is that of one regular sexual partner plus other partners. *See, e.g.*, Blasband, D., & Peplau, L. A., *Sexual Exclusivity Versus Openness in Gay Male Couples*. 14 Archives of Sexual Behavior 395-412 (1985); Peplau, L. A., & Cochran, S. D., *Value Orientations in the Intimate Relationships of Gay Men*, 6 Journal of Homosexuality 1-9 (1981).

[21] Homosexual men had 16.9 partners in the last 5 years as compared to 4.9 partners of heterosexual men. Laumann et al. also notes that stereotype of lesbians having "lower rates at which new partners are required" does not fit the pattern revealed in the research.

[22] On average, homosexuals have 50 lifetime partners, compared to 4 lifetime partners among heterosexuals. Less than 2% of homosexuals are monogamous, while 83% of heterosexual couples are. Data compiled from Laumann et al., *The Social Organization of Sexuality* and R. T. Michael et al. *Sex in America: A Definitive Survey* (1994).

had one partner in the past year, heterosexual couples who were cohabiting were almost as faithful, and 75% of people who had never married but were living together had one partner in the past year. Robert T. Michael, et al., *Sex in America: A Definitive Survey* 101 (1994).

APA Amici cite R.A. Mackey et al. to assert that heterosexual and homosexual relationships "strongly resemble" each other in "many respects." APA Br. at 18. Mackey et al. notes that their study used logistic regression as a "useful took in this exploratory research, where the goal was to develop theory rather than test it." R.A. Mackey et al., *Psychological Intimacy in the Lasting Relationships of Heterosexual and Same-Gender Couples*, 42 Sex Roles 201-227, 213 (2000). They note further that "the goal was not to test theory but to develop an understanding of a subject . . . the sample fit the goal of this exploratory study." Mackey et al., id., at 223. The chosen sample specifically excluded couples that were together less than 15 years and did not indicate the percent of homosexual versus heterosexual couples which had to be excluded in order to achieve a comparable sample between the two couple types. This provides a very narrow, non-representative subset of the general homosexual population to compare to a more representative sample of the heterosexual population.

Cochran, one of the contributors to the APA Amici brief, has herself stated in a study that "Little empirical work is currently available on commitment and permanence in homosexual relationships." L.A. Peplau & Susan D. Cochran, *A Relationship Perspective on Homosexuality* 321, 335 in *Homosexuality/Heterosexuality: Concepts of Sexual Orientation* (1990).

The APA's brief cites to Laumann et al. to support their statement that the sexual practices prohibited by the Texas law "are important aspects of sexual intimacy for many

American heterosexual couples." APA Br. at 21. However, Laumann's study specifically reveals that oral sex is "a technique with which most people have at least some familiarity, but it has in no sense become a defining feature of sex between women and men (as vaginal intercourse or, perhaps, kissing is) . . . it is important to establish at the outset the ambiguity of oral sex in the repertoire of [heterosexual] techniques." Laumann et al., *supra*, at 101.

Laumann's research also reveals that heterosexuals engage in anal sex even less than oral sex: "anal sex has not entered into the repertoire of regular sexual practices of most women and men in the United States." Laumann, *supra*, at 107. This study found that only one-quarter of men and one-fifth of women have experienced anal sex over a lifetime, and is far less frequent than that in any given year of life. *Id.* Heterosexuals were also 79% less likely to find anal intercourse as "very appealing" compared to vaginal intercourse. Laumann et al., *supra*, at 152-155, Table 4.2.

Because oral and anal sex are primary means of sexual activity between individuals of the same sex (APA Br. at 22-23), and such is not the case with heterosexual couples, it should be considered that the Texas law has reasonably and narrowly drawn their prohibition of "deviate sexual intercourse" to those couples where it is most likely to take place. The Texas law may also contemplate the higher rates of sexually transmitted diseases which are related to certain sexual behaviors, and seeks to prohibit behavior associated with a higher prevalence of sexually transmitted infections (not only HIV/AIDS) and sexually associated infections and other illnesses. Laumann et al., *supra*, at 396.

It is well-documented that as the number of sexual partners rise, the likelihood of having a partner with a sexually transmitted infection also rises. Laumann et al., *supra*, at 403; *see generally* Hickson et al., *supra*. As has

been noted, homosexuals have a much greater number of sexual partners,[23] as compared to heterosexuals, and engage in sexually riskier activity,[24] therefore, there are serious health considerations implicated in same-sex sexual activity which should be taken into account when a legislature proscribes certain sexual activities.

B. Obligatory Fatherlessness and Motherlessness

Attempting to create a legal and factual connection between Texas Penal Code § 21.06 and same-sex parenting data, the APA Amici allege that "suppressing sexual intimacy among same-sex partners would deprive gay men and lesbians of the opportunity to participate in fundamental aspects of human experience," including the opportunity to raise children in a family setting. APA Br. at 15, 19. Once again, however, APA Amici attempt to prove too much. In an effort to demonstrate that large numbers of same-sex couples are raising children, the APA claims that "the children of lesbian and gay parents in the United States today *almost certainly* number in the millions." At the same time, however, they acknowledge that there are "no data" to indicate the number of same-sex couples raising children in the United States. APA Br. at 19. Moreover, in suggesting that hundreds of thousands of gay and lesbian parents are

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[23] "[Gay male relationship] rules emphasize that other sexual relationships are different; that they are 'only sex' . . . 'We must not go back to someone twice; that would be a relationship,' 'We're not allowed to have partners we see more than once.'" Hickson et al., *supra*, at 415.

[24] "For HIV/AIDS in particular, anal intercourse is known to be especially dangerous because it is an efficient way of transmitting HIV." Laumann at 416; "Survey and clinical trials data indicate that condom breakage and slippage rates vary during anal intercourse and may be considerably higher than during vaginal intercourse," Silverman, et al., *Use and Effectiveness of Condoms During Anal Intercourse*, 24 Sexually Transmitted Diseases No. 1 Jan. 1997.

currently raising children in the United States,[25] APA Amici implicitly rebut their own premise that section 21.06 deprives gay men and lesbians of the opportunity to raise children.

The APA also succumbs to the temptation of overstating the available research on same-sex parenting, suggesting that a cumulative body of faulty research gains credibility by virtue of sheer volume. Over the past two years, even researchers who are generally supportive of same-sex parenting have been forced to conclude that (a) there is no reliable body of scientific data addressing the question of same-sex parenting, and (b) what evidence exists tends to show certain differences between children raised by gay and lesbian parents and children raised by a married heterosexual couple.

In 2001, Professors Judith Stacey and Timothy Biblarz reviewed 21 studies from the body of research purporting to examine homosexual parenting. Judith Stacey and Timothy Biblarz, *(How) Does The Sexual Orientation of Parents Matter?*, 66 Am. Sociological Rev. 159 (2001); *See also* Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 Developmental Psychology 130, 133-134 (1995). Despite their personal endorsement of parenting by same-sex couples, Stacey and Biblarz found serious problems with both the methodology and the conclusions of the studies they reviewed. *Stacey, supra* at 174. Notably, the authors acknowledge "there are no

[25] Data from the 2000 Census shows 601,209 same-sex couples in the United States, roughly 7% (42,912) of whom live in the state of Texas even in spite of section 21.06. Table PCT1: Unmarried-partners households by sex of partners, 2000 United States Census, available at www.census.gov (last visited Feb. 13, 2003) . While not all gay and lesbian parents live in same-sex partnerships, this proportion of same-sex couples living in Texas suggests that APA may overstate the impact of the Texas statute.

studies of child development based on random, representative samples of [same-sex couple headed] families." *Id.* at 166. Robert Lerner and Althea Nagai earlier reached a similar conclusion after reviewing 49 of the studies comprising the body of gay parenting research. Due to the deeply flawed methodologies prevalent in every study, Lerner and Nagai were forced to conclude "that the methods used in these studies are so flawed that the studies prove nothing." Lerner and Nagai, *supra*, at 6. Common problems with the studies included: (1) failure to use a testable hypothesis or attempt to prove a negative hypothesis (*id.* at 13-16); (2) lack of control methods, such as failure to control for group variables like income and education, or even the complete failure to use any comparison group (*id.* at 27); (3) no references to the measures used to establish the validity of the studies (*id.* at 66); (4) absence of representative samples including self-selected sample groups (*id.* at 75-77); (5) Failure to show that the results are not a function of chance factors.

Among the methodological flaws in the same-sex parenting research is a tendency of researchers to ignore their own data suggesting a number of differential outcomes for children of homosexual parents, including an increased likelihood of the child's developing a homosexual sexual orientation. Stacey and Biblarz, *id.*, (2001).

The surprising part about ignoring such differences, particularly as to the sexual orientation of children of homosexual parents, is that they would be predicted by the major theories of the psychology of child development. As Baumrind stated in questioning the work of Charlotte Patterson, for example, "[t]heoretically, one might expect children to identify with lifestyle features of their gay and lesbian parents." Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 Developmental Psychology 130, 134 (1995). As well, one

"might also expect gay and lesbian parents to be supportive . . . of their child's nonnormative sexual orientation." *Id.* As a result, Baumrind said, "[i]t would be surprising indeed . . . if children's own sexual identities were unaffected by the sexual identities of their parents." *Id.*

The existence of such differences is not just theoretically predicted, but also reflected in actual study results. As Stacey and Biblarz wrote in their study:

> A significantly greater proportion of young adult children raised by lesbian than heterosexual mothers in the Tasker and Golombok sample reported having had a homoerotic relationship (6 of the 25 young adults raised by lesbian mothers–24% compared with 0 of the 20 raised by heterosexual mothers). . . .
>
> Relative to their counterparts with heterosexual parents, the adolescent and young adult girls raised by lesbian mothers appear to have been more sexually adventurous and less chaste. . . .
>
> [P]arental sexual orientation is positively associated with the possibility that children will attain a similar orientation, and theory and common sense also support such a view. Children raised by lesbian co-parents should and do seem to grow up more open to homoerotic relationships.

Stacey and Biblarz, *supra*, at 170.

Finally, while the causal mechanisms are disputed, the APA Amici brief does concede that homosexual sexual behavior correlates with increased rates of depression, substance abuse, sexually transmitted diseases and even suicidal ideation. APA Br. at 26. Given this unfortunate correlation, many remain skeptical that families headed by same-sex couples are a place in which children should be raised.

VI. THERE IS NO CAUSAL CONNECTION BETWEEN DISAPPROVAL FOR SAME-SEX SEXUAL ACTIVITY AND PSYCHOPATHOLOGIES RELATED TO HOMOSEXUALITY

While empirical research has found strong correlations between homosexuality and psychopathology, APA Amici *both* disclaim the existence of such an association, and without evidence attribute its existence to societal disapproval of homosexuality. APA Br. at 12, 26.

First, APA Amici claim that "[r]esearch has found no inherent association between homosexuality and psychopathology." APA Br. at 2. This is simply false. While research has not conclusively discovered the causes of homosexuality and other psychopathologies, even experts relied upon by APA Amici concede that homosexuality and various psychopathological conditions are strongly correlated. S.E. Gilman, et al, Risk of Psychiatric Disorders Among Individuals Reporting Same-Sex Sexual Partners in the National Comorbidity Survey, 91 Amer. J. Pub. Health 933-39 (2001) (Using data from a nationally representative household survey, researchers found that "homosexual orientation, defined as having same-sex sexual partners, is associated with a general elevation of risk for anxiety, mood, and substance use disorders, and for suicidal thoughts and plans.").

Various theories exist as to the causation of these conditions. APA Amici attribute these conditions solely to societal prejudice, asserting confidently that "research conducted over four decades has established that 'homosexuality in and of itself bears no necessary relationship to psychological adjustment.'" APA Brief at 11-12.

Relying on three studies conducted between 1978 and 1982, as well as one from 1991, conducted by one of the APA brief authors, this statement blithely ignores the findings of a 2001 study conducted by the same author in which she found and concluded precisely the opposite of her earlier claims. In a study published in the American Journal of Public Health, S.E. Gilman, S.D. Cochran, and others studied the risk of psychiatric disorders among individuals with same-sex sexual partners. Relying on data from the National Comorbidity Survey, a nationally representative household survey, these researchers concluded that "homosexual orientation, defined as having same-sex sexual partners, is associated with a general elevation of risk for anxiety, mood, and substance use disorders, and for suicidal thoughts and plans." S.E. Gilman, et al, *Risk of Psychiatric Disorders Among Individuals Reporting Same-Sex Sexual Partners in the National Comorbidity Survey*, 91 Amer. J. Pub. Health 933-39 (2001). Neither were the researchers able to determine that this correlation was due, in whole or in part, to social stigma, concluding that additional research was needed to explore the "causal mechanisms" underlying the association. *Id.*

Dr. J. Bailey, another researcher on whom APA Amici rely, actually reached a contrary conclusion, noting that "homosexuality may represent developmental error," based upon research connecting homosexuality with "developmental instability." J. Bailey, *Homosexuality and Mental Illness*, 56 Archives of Gen. Psych. No. 10, p. 183-184.

Recent trends of increased social acceptance of homosexuality also fail to support the proposition of APA Amici that psychopathologies linked with homosexuality are due solely to social stigma. In citing to the 2001 report, *Inside-OUT*, APA fail to mention its findings that 76% of gays, lesbians, and bisexuals believe they are more accepted

among the general public now as compared to a few years ago.[26] Moreover, in cities and countries with the highest degree of social and legal acceptance of homosexuality, associated pathology rates are at their highest. In the Netherlands, for example, where same-sex couples are allowed to marry, adopt children, and are generally treated more sympathetically in the law and culture, an important study still concluded that "[p]sychiatric disorders were more prevalent among homosexually active people compared with heterosexually active people" and that "people with same-sex sexual behavior are at greater risk for psychiatric disorders."27

In the face of this data, APA Amici continue to argue strenuously that homosexuality is simply one variant of normal sexual expression, relying in part on the decision of the APA to declassify homosexuality as a mental disorder in 1973. APA Amici depart from the data however, when they suggest that the decision was a scientific decision based on years of research.

At a fundamental level, pathologies are tautologically defined, totally unrelated from the realm of science. Ultimately, homosexuality is not a pathology because the APA declared it to be "normal." A pathology or mental disorder is simply an undesirable abnormality. If normality is defined on a statistical basis, anyone departing from that statistical norm has an abnormal mental condition. When speaking of disorders, however, a psychologist speaks only

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[26] Henry J. Kaiser Family Foundation, Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation (2001).

[27] Theo G. M. Sandfort, et al, *Same-Sex Sexual Behavior and Psychiatric Disorders: Findings from the Netherlands Mental Health Survey and Incidence Study (NEMESIS)*, 58 Archives of General Psychiatry 867 (Jan. 2001).

of those abnormal conditions which society deems undesirable. Social science cannot make the subjective determination as to whether a condition is desirable or undesirable. Whatever good faith considerations may play a role in that decision, it cannot be termed a scientific decision. Where a respected body such as the APA decides to declassify a condition such as homosexuality in spite of its ongoing correlation with other psychopathological disorders, that decision must be attributed to an evolving (and arguably politicized) standard of "normalcy" and "desirability," rather than any underlying scientific developments.

CONCLUSION

For the reasons stated above, this Court should refrain from any reliance upon the uncertain statistical data put forward by the APA, et al. Rather than insert itself into a developing scientific field, the Court should defer to the Texas Legislature in this inquiry, affirming the decision of the court below.

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